ARBITRATION ADVISORY

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DISCLOSURES TO BE MADE BY ARBITRATORS TO PARTIES

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INTRODUCTION

What disclosures should an arbitrator make to the parties before commencing the arbitration? Avoiding not only bias, but also the appearance of bias, is of vital importance to the success of an arbitration. In general, the Committee recommends that full disclosure of all knowledge and relationships to parties and their counsel be made by arbitrators in writing in advance of the hearing.

Fee arbitrations are often conducted in a setting where the parties have voluntarily agreed to binding arbitration. It is the general rule in California that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. Consequently, the parties to a binding arbitration have accepted the risk that an arbitrator will make a mistake. By voluntarily submitting to binding arbitration, the parties in effect have agreed to bear that risk in return for a quick, inexpensive and conclusive resolution to their dispute. One of the risks that the parties do not accept, however, is the risk of undisclosed favoritism, bias or prejudice in favor of or against one of the parties.

Arbitration is a consensual procedure. Both clients and attorneys cannot be expected to participate in fee arbitration, and to consent to binding arbitration or allow non-binding decisions to stand if they sense bias in the proceedings. An arbitrator's award may be vacated under Code of Civil Procedure section 1286.2(b) if it is determined that the award was the result of corruption in any of the arbitrators. Case law has interpreted this to include bias or prejudice, which may be implied by an arbitrator's failure to disclose a significant relationship to one of the parties or their counsel. This advisory will offer some guidance to arbitrators as to what disclosures should be made to avoid bias, prejudice or the appearance of impropriety.

DISCUSSION OF APPLICABLE LAW

Arbitrators must disclose to the parties in advance of the arbitration hearing any dealings that might create an impression of possible bias [Britz, Inc. v. Alfa-Lavel Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1102].

Code of Civil Procedure section 1282(e) requires that an arbitrator disqualify himself or herself, upon the demand of any party, based on any of the grounds set forth in Code of Civil Procedure section 170.1. This Code Section generally sets forth the grounds upon which a judge is disqualified from hearing a case. These include:

(a) The arbitrator has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) Within the past two years, the arbitrator has acted as counsel in the proceeding or any other proceeding involving the same issues for any party, or gave advice to any party on the matters involved;

(c) Within the past two years, the arbitrator has been an officer, director or trustee of a party, or one of the parties is or was a client of the arbitrator or law partners of the arbitrator;

(d) The arbitrator has any financial interest in the proceeding (the arbitrator has a duty to inform himself or herself about personal and fiduciary interests and those of the arbitrator's spouse and family members);

(e) Certain familial relationships exist between the arbitrator and a party or an officer, director or trustee of a party;

(f) Certain familial or law practice relationships exist between the arbitrator and any attorney for a party, or with the partners of such attorney;

(g) Any circumstances exist where the arbitrator believes that his or her recusal would further the interests of justice; or there is substantial doubt as to his or her capacity to be impartial; or where a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial; and

(h) Where the arbitrator suffers from temporary or permanent impairment and is unable properly to perceive the evidence or conduct the hearing.

Code of Civil Procedure section 170.1(a)(6) requires the recusal of an arbitrator if any person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial. This includes bias or prejudice toward a lawyer for one of the parties in the proceeding. To allow the parties to evaluate whether or not the capacity to be impartial exists, it is necessary for the arbitrator to disclose to all parties any circumstances where one could reasonably form a belief that an arbitrator would be biased for or against a party. The standard is whether a reasonable person, knowing all the facts and looking at the circumstances at the time the motion is brought, would question the arbitrator's impartiality [Betz v. Pankow (1995) 31 Cal. App. 4th 1503, 1508-9]. There is no bright line of demarcation for the existence of an impression of possible bias, and each case must be considered in light of its particular circumstances. An arbitrator's award will be vacated if a reviewing Court determines that the rights of a party were substantially prejudiced by the misconduct or bias of a neutral arbitrator [Betz v. Pankow, supra, 31 Cal. App. 4th at 1508; C.C.P. §1286.2(b)(c)].

Further, Code of Civil Procedure section 1286.2(f) specifically provides that a Court may vacate an arbitration award if any arbitrator fails to disqualify himself or herself upon the demand of any party made before the conclusion of the proceedings, on any of the grounds provided in Code of Civil Procedure section 170.1.

In Commonwealth Coatings Corp. v. Continental Casualty Co. (1968) 393 U.S. 145, the United States Supreme Court considered the extent to which disclosure should be

required by a neutral arbitrator. The Court held that even in the absence of any showing of actual fraud, corruption or partiality on the part of a neutral arbitrator, the failure to disclose even sporadic but substantial business relationships with a party to the arbitration constituted legal cause for vacating the award.

> "It is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award."
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> (Concurring opinion of Justice White in Commonwealth, 393 U.S. at p. 151)

California law requires that significant or substantial business relationships between the arbitrator and a party or his legal representatives be disclosed to all the parties to avoid the appearance of impropriety. Ordinary and insubstantial business dealings do not necessarily require disclosure [See e.g. Figi v. New Hampshire Ins. Co. (1980) 108 Cal. App. 3d 772]. Whether a particular relationship is substantial enough to require disclosure is a factual question to be determined by the trier of fact in each case. Unfortunately, this means that the parties must proceed to Court for a determination of whether or not an arbitrator has made an adequate disclosure.

To avoid the risk that the arbitrator's award may be vacated, a thorough disclosure of relationships between the arbitrator and the parties or between the arbitrator and any of the attorneys for the parties must be made.

These relationships present a difficult situation especially in smaller communities or where the arbitrator or party is a prominent member of the local bar. An arbitrator will often have some knowledge of or familiarity with one of the parties. While the arbitrator having personal knowledge or acquaintance with one of the parties does not automatically require disqualification, it certainly is a basis upon which there may be an appearance of impropriety, bias, or prejudice. The same is true, to an even greater degree, where the arbitrator has a friendship, social acquaintance or business relationship with one of the parties.

It is not sufficient for the arbitrator unilaterally to decide, without disclosure, that he or she is capable of making an impartial decision. It would be distressing to either party to the arbitration later to discover that a friendship exists between one of the parties and the arbitrator, or that there is any relationship that could even hint at the appearance of impropriety.

INITIAL REVIEW BY ARBITRATOR FOR POTENTIAL BIAS

In making a decision as to what should be disclosed, the arbitrator should start by reviewing the file to determine who all of the parties and counsel are, and also to attempt to determine who the witnesses might be to determine if there is any disclosure which should be made about a relationship with a party, counsel or witness.

When the arbitrator is first requested to arbitrate a fee dispute, the arbitrator should perform the same type of conflict check analysis that an attorney would conduct in undertaking the representation of a new matter. That conflict check should encompass the

parties to the arbitration, their attorneys, if any, and any then anticipated witnesses. The analysis should consider not only the applicable case law and statutes, but should also consider the potential difficulties that can arise if the losing party thereafter decides to make a claim of bias.

The arbitrator should consider:

(1) Can I be fair and impartial?

(2) Will my service be perceived as being fair and impartial?

Where the first question cannot be answered positively, the arbitrator must withdraw. If the answer to the second question is uncertain, the arbitrator must then consider whether it will be necessary to withdraw or whether it is sufficient to disclose the matter and let the parties decide whether to recuse the arbitrator.
In most instances where the arbitrator knows one of the parties, it will typically be an acquaintance or previous working relationship with the attorney party to the arbitration or with the legal counsel for a party. Common examples of this are where the attorney and the arbitrator have worked together as co-counsel or as opposing counsel on a case. Perhaps the attorneys were involved in negotiating a transaction with each other on behalf of their respective clients or have served together on a Bar Committee or have socialized at Bar functions. Perhaps the attorneys and the arbitrator have had an acrimonious relationship in the past.

There are no rules which expressly prohibit an arbitrator from hearing a case where the arbitrator has knowledge or an acquaintance with one or both of the parties, or their counsel, so long as disclosure has been made. An arbitrator would clearly be required to recuse himself or herself upon demand by a party if any of the conditions set forth in Code of Civil Procedure section 170.1 exist. Under Code of Civil Procedure section 170.1(a)(6), there is one very subjective standard in which an arbitrator should decline to hear a matter where either the arbitrator believes that he or she may be unable to be impartial, or any reasonable person might reasonably entertain a doubt as to the arbitrator's ability to be impartial. This requires the arbitrator to exercise reasonable discretion, and to make a determination whether to decline to serve as arbitrator in the matter. If there is any doubt, the arbitrator should decline to hear the matter.

WHAT SHOULD BE DISCLOSED?

The Mandatory Fee Arbitration program rules allow a party the opportunity to disqualify an arbitrator. To have sufficient information to exercise these rights, the parties must receive a full disclosure of the arbitrator's acquaintance or relationship to each of the parties, in writing, before the commencement of the arbitration. This affords the parties the opportunity to object to the arbitrator. If one of the parties does object, the arbitrator should decline to hear the matter and send it back to the local Bar Association for reassignment.

In addition to the guidelines established in Code of Civil Procedure section 170.1, as outlined above, matters which require disclosure or ought to be disclosed in advance of the arbitration include, by way of example only, the following:

(a) A friendship or existence of any social relationship;

(b) An acquaintance based upon working with one of the parties in Bar

activities or non-legal activities (such as volunteer or charitable events);

(c) Any previous relationship as legal counsel for a party;

(d) Any previous business relationships, or business association of any kind;

(e) Any familial relationships, including relationships with spouses or family members of the arbitrators and or the parties or their legal representatives;

(f) Any situation where the arbitrator has previously adjudicated a proceeding in which one of the parties or their legal counsel was involved; and

(g) Any situation where the arbitrator has been the subject of any legal proceedings involving one of the parties or their legal counsel.

The question also often comes up often about how remote in time may such a relationship have been before it need not be disclosed. The best course, however, is to disclose no matter how remote in time it may have been.

Fee arbitrators should always keep in mind that where a full disclosure has been made the parties to the arbitration have the opportunity to raise an objection and seek appointment of another arbitrator. Where there is a failure to make a complete disclosure, the parties to the arbitration will have the opportunity to seek to vacate the arbitration award. The Superior Court, when considering a petition to confirm or vacate an arbitration award, is required to determine *de novo* whether the circumstances disclose a reasonable impression of arbitrator bias [Britz, Inc. v. Alfa - Lavel Food & Dairy Co., supra, 34 Cal. App. 4th 1085, 1102]. To determine the adequacy of disclosure by an arbitrator, the Superior Court may require an evidentiary hearing to explore the full extent and nature of the relationships between the parties and the arbitrator [Britz, supra, 34 Cal. App. 4th at 1100-02]. Under Evidence Code section 703.5(d), the Arbitrator may be called as a witness or required to give a declaration concerning the existence of bias, and the adequacy of disclosure. These circumstances are best avoided by full and complete disclosure at the outset of the proceedings. When in doubt, disclose.

DISCLOSURES RELATING TO RESULTS OF PRIOR FEE ARBITRATION PROCEEDINGS

One question frequently arises in cases where the arbitrator has previously heard an arbitration involving one of the parties (or their counsel). Should the results of the prior arbitration be disclosed? Some of the Fee Arbitration Program Rules provide that awards are not confidential. Others provide that the entire proceeding, including the award is confidential. It is the Committee's conclusion that the objectives of Business and Professions Code section 6200 et seq. are satisfied by keeping the results of prior fee arbitrations confidential. The statutory framework of Business and Professions Code section 6200 et seq. provides for confidentiality of fee arbitration proceedings, which would be undermined if an arbitrator were required to disclose the results of prior fee arbitrations involving the parties or their counsel.

The Committee is of the opinion that the conflict between disclosure and confidentiality must be resolved in favor of maintaining the confidentiality of the fee arbitration proceeding. Confidentiality is the cornerstone whereby clients and attorneys are encouraged to

choose the mandatory fee arbitration process. Therefore, to foster confidence, candor and maximum participation in that process, a very cautious approach must be taken regarding disclosures of results of prior fee arbitration proceedings. The Committee recommends that an arbitrator not disclose the results of prior fee arbitrations unless the consent of the parties to the earlier proceedings has been obtained. However, the fact that there was a prior arbitration and the existence of the relationship should be disclosed.

Arbitrators may also wish to review other advisories on disclosure issues. See Arbitrator Advisory 94-03 "Avoiding Arbitrator Bias" dated July 15, 1994 and Arbitrator Advisory 95-01 "Disclosure Required of Fee Arbitrators by Code of Civil Procedure section 1281.9" dated April 28, 1995.